87-695

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

DOROTHY LOUISE TURNER, EXECUTRIX
OF THE ESTATE OF O. L. TURNER,
Petitioner,

vs.

CITY OF ATLANTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the City of Atlanta's actions in downzoning Petitioner's improved commercial property, which did not substantially advance any legitimate state interest, constitute a "taking" of Petitioner's property in contravention of the Fifth Amendment and in contravention of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the Fourteenth Amendment of the Constitution of the United States prohibiting any State from depriving any person of life, liberty or property without due process of law required the City of Atlanta to provide Petitioner with either individual notice, or notice by publication that identified Petitioner's property, before it downzoned Petitioner's improved commercial property.

LIST OF PARTIES

The caption contains all of the parties to the proceedings in the Georgia Supreme Court.

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OPINIONS BELOW

The decision of the Fulton Superior Court is unreported and the decision of the Georgia Supreme Court is reported at 257 Ga. 306, 357 S.E.2d 802 (July 16, 1987), *reh'g denied* (July 29, 1987).

JURISDICTION

On July 16, 1987, the Supreme Court of Georgia affirmed, over a vigorous dissenting opinion,[1] the trial court's decision allowing the City of Atlanta to downzone[2] Peti-

1. The July 16, 1987, opinion is reprinted in its entirety at Appendix A, pp. A1-A7.

2. The term "downzoning" refers to the 1982 Atlanta Zoning Ordinance which rezoned Petitioner's motel into a substantially more restrictive zoning classification and deprived Petitioner of any future expansion of his business. *See* "O-I" Office - Institutional District Regulations, Section 16-10.003(16) of Chapter 10 of the 1982 Atlanta Zoning Ordinance, Appendix G, p. A39.

tioner's improved commercial property without notice[3] and without any evidence showing that the downzoning substantially advanced any legitimate State interest. Petitioner's motion for rehearing was denied on July 29, 1987.

This Court has jurisdiction over this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(3). The validity of the 1982 Atlanta Zoning Ordinance, which downzoned Petitioner's property without individual notice, and without notice by publication, is drawn in question because it is repugnant to the "taking" clause of the Fifth Amendment of the Constitution of the United States and to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

1. Fifth Amendment, United States Constitution, see Appendix J, p. A42 for verbatim text.
2. Fourteenth Amendment, Section 1, United States Constitution, see Appendix J, p. A42 for verbatim text.
3. 28 U.S.C. § 1257, see Appendix J, p. A43 for verbatim text.
4. Changes and Amendments, Section 16-36001 of Chapter 36 of the 1976 Atlanta Zoning Ordinance, see Appendix E, p. A36 for verbatim text.

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3. The record reflects the undisputed fact that Petitioner did not receive notice of the downzoning, nor did the City of Atlanta even attempt to provide Petitioner with individual notice either by sending him a letter or by publication which identified Petitioner's property. *See* Statement Of Case, Argument, the Notice Issue, p. 11.

5. Changes and Amendments, Section 16-36004 of Chapter 36 of the 1976 Atlanta Zoning Ordinance, see Appendix F, p. A37 for verbatim text.

6. Office-Institutional District Regulations, Section 16-10.003(16) of Chapter 10 of the 1982 Atlanta Zoning Ordinance, see Appendix G, p. A39 for verbatim text.

7. C-1, Community Business District Regulations, Section 16-11.003(14) of Chapter 11 of the 1982 Atlanta Zoning Ordinance, see Appendix H, p. A40 for verbatim text.

8. C-2, Community Service District Regulations, Section 16-12.003(14) of Chapter 12 of the 1982 Atlanta Zoning Ordinance, see Appendix I, p. A41 for verbatim text.

STATEMENT OF THE CASE

Summary of Facts

Petitioner[4] is the owner of certain land located on Stewart Avenue in Fulton County, Georgia that was zoned commercial for 30 years prior to January 1, 1982. The land consists of two parcels which total approximately five acres. One of the parcels was zoned "C-1" Community Business District and the other was zoned "C-2" Community Service District. (T. 121-26) (R. 26). Petitioner purchased the property in 1962 for the purpose of acquiring and expanding a motel which was located on the property. (R. 5) (T. 40). In 1974 Mr. Turner expanded the motel from 19 rooms to 29 rooms. (T. 40). The record is undisputed that the tracts contain sufficient undeveloped property to permit further expansion of the motel. (T. 40).

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4. Petitioner is the Executrix of the Estate of and the wife of Mr. O. L. Turner who died during the pendency of the appeal to the Georgia Supreme Court.

On December 15, 1980, the Atlanta City Council adopted the 1982 Atlanta Zoning Ordinance which, among other things, downzoned Petitioner's property from commercial to office and institutional. (R. 5, 26). The only alleged justification for the downzoning was to conform the zoning of the property to that of the Atlanta Area Technical School which is located to the north of the property. The evidence in the record is undisputed, however, that the prevailing use along Stewart Avenue is commercial and that the vast majority of the land to the west and south of Petitioner's property is zoned commercial. (T. 27-28). Petitioner was unaware and was never notified that the 1982 Atlanta Zoning Ordinance had any affect on the zoning of his property. The change in the zoning classification to office and institutional made Petitioner's motel a non-conforming use and prohibited any further expansion of the motel. (R. 26) (T. 121-26, 142-45). Both the "C-1" and "C-2" commercial zoning classifications under the 1982 Atlanta Zoning Ordinance permitted motels without any restriction on the number of rooms. (T. 146-53) (Appendix H and I, pp. A40-A41). Petitioner also suffered a significant detriment in several other respects, including, but not limited to an undisputed $154,000 reduction in the value of his property. (T. 26).

The City of Atlanta made a deliberate decision not to give individual notice to Petitioner, or to any other similarly situated property owners, before it enacted the 1982 Atlanta Zoning Ordinance. (T. 66). The City of Atlanta at no time posted a sign on Petitioner's property providing notice that it was being downzoned, nor did it send a letter or any other notice in the mail to Petitioner informing him that his property was being downzoned. (T. 41, 64). The City of Atlanta did not even attempt to provide notice

by publication which might inform Petitioner that his property was being downzoned. (T. 103). The record is undisputed that the City of Atlanta was aware that Petitioner's land contained improved commercial property consisting of a 29-unit motel. (T. 66). The only notice provided by the City of Atlanta, prior to the enactment of the 1982 Atlanta Zoning Ordinance, which it contends satisfies due process, was through the media, public hearings and neighborhood planning units which only generally discussed the proposed 1982 Atlanta Zoning Ordinance. (T. 77-82). This general notice, however, did not and was not designed to specifically identify Petitioner's property, nor was it otherwise reasonably calculated to inform Petitioner that his property would be downzoned. (T. 103).

Mr. William Kennedy, Zoning Administrator for the City of Atlanta, testified at the bench trial that it was too costly for the City of Atlanta to notify Petitioner that his property was going to be downzoned. (T. 67). He also admitted that he did not know what the cost would have been to provide individual notice and that Petitioner's address was readily available. (T. 66, 71, 100).

Mr. Turner became aware that his property had been downzoned in the summer of 1983. (T. 42). At that time Petitioner entered into an agreement with National Advertising permitting the placement of a billboard on his property in exchange for annual rent payments to Petitioner in the amount of $3700 per year. (T. 41-42). When a permit was applied for to erect the billboard, the request was denied because Petitioner's property had been downzoned to a use classification which no longer permitted billboards. (T. 42). This was Turner's first knowledge of the rezoning.

On May 9, 1984, after unsuccessfully attempting to convince the City of Atlanta to place his property back in its original and compatible commercial zoning classification, Petitioner submitted an Application for Rezoning.[5] (R. 6) (T. 107-110). On June 1, 1984, the City of Atlanta, by and through its City Council, denied Petitioner's Application for Rezoning. (R. 6).

Petitioner timely filed his Complaint for Declaratory and Equitable Relief on June 27, 1984 in the Superior Court of Fulton County seeking to have the Atlanta Zoning Ordinance declared null and void with respect to its application to his property. (R. 4-20) (Appendix D, pp. A16-A35). Petitioner further argued in the trial court that the City of Atlanta's decision to reject Petitioner's Application for Rezoning was violative of Petitioner's constitutional rights on the grounds that no notice of the downzoning was given in violation of the due process clause of the Fourteenth Amendment and in violation of the "taking" clause of the Fifth Amendment. (Appendix D, pp. A20-A22) (R. 6-7). Petitioner sought to have the trial court order that the City of Atlanta give his property a rezoning classification which would not violate his constitutional rights and deprive him of the reasonable use of his property. (Appendix D, pp. A20-A22) (R. 8).

This case came on for a trial on January 28, 1986, in the Superior Court of Fulton County without a jury.

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5. Petitioner properly challenged the constitutionality of the 1982 Atlanta Zoning Ordinance, which downzoned his property from commercial to office and institutional, before the Atlanta City Council, the appropriate governing body. (R. 8, 15-20, 26). The Application for Rezoning and attached letters to members of the Atlanta City Council properly preserving the constitutional issues are reprinted at Appendix D, pp. A23-A35.

On July 9, 1986, the trial court entered judgment in favor of the City of Atlanta and against Petitioner. (R. 83-91). Petitioner timely filed his notice of appeal on August 7, 1986 to the Georgia Supreme Court, which was decided adversely to Petitioner on July 16, 1987, with the rehearing denied on July 29, 1987. (R. 1-2).

ARGUMENT

1. The "Taking" Issue

The Supreme Court of the United States has repeatedly held that if a regulation goes "too far," a compensable taking has occurred. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). This principle of law is clearly applicable to zoning cases. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 140 (1978); *Nectow v. City of Cambridge,* 277 U.S. 183, 188 (1928). In *Nectow* this Court held that:

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare. *Euclid, supra,* p. 395.

Nectow, 277 U.S. at 188.

The question of whether a regulation has gone "too far" turns upon the circumstances of each case and requires essentially an "ad hoc" inquiry. *Penn Central,* 438 U.S. at 124. Where the zoning ordinance has no substantial relation to the public health, safety, morals

or general welfare, the ordinance as applied is clearly unconstitutional. *Nectow,* 277 U.S. at 188. Between the *Nectow* decision in 1928 and 1972, however, with one minor exception, this Court did not review the substance of any zoning ordinances. *Moore v. City of East Cleveland,* 431 U.S. 494, 514 (1977) (Stevens, J. concurring). Since that time, this Court has more closely scrutinized governmental action in numerous other "taking" cases and has shifted its focus towards a "justice and fairness" analysis. *Agins v. Tiburon,* 477 U.S. 255, 263 (1980); *Penn Central,* 438 U.S. at 124.

The significant factors to consider in determining whether a taking has occurred include "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . ." *Penn Central,* 438 U.S. at 124. In this case, Mr. Turner purchased the subject property in 1962 with the expectation that he would operate and expand his motel. In 1975 Petitioner expanded his motel from 19 rooms to 29 rooms. The expansion of the motel was consistent with Petitioner's "investment-backed expectations. . . ." *Id.* After the City of Atlanta downzoned his property, Mr. Turner was prohibited from further expanding his motel.[6]

With respect to the economic impact of the downzoning, the evidence in the record is undisputed that at the time of trial Mr. Turner's property was worth $230,000 zoned commercial, as it had been zoned for thirty years, and only $76,000 after the downzoning. (T. 26). While a

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6. "Zoning is a means by which a governmental body can plan for the future - it may not be used as a means to deny the future." *City of Eastlake v. Forest City Enters., Inc.,* 426 U.S. 668, 682 (1976) (footnote 4 citing *National Land & Inv. Co. v. Eastown Township Bd. of Adjustment,* 419 Pa. 504, 528, 215 A.2d 597, 610 (1965)).

decline in economic value is not solely determinative of the "taking" issue, it is a significant factor. *Penn Central,* 438 U.S. at 124.

This case is the reverse of the usual zoning case where a property owner seeks to have his property placed in a less restrictive zoning classification, or upzoned. For example, developers frequently contract to purchase vacant land which is zoned residential, or subject to a similarly restrictive zoning classification, with a contingency in the contract for the property being upzoned to permit the proposed development. In this case Mr. Turner's property was zoned commercial for over thirty years and contained improved and developed commercial property. Former Chief Justice Burger acknowledged this critical distinction in *City of Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 679 (1976), where he stated:

> The situation presented in this case is not one of a zoning action denigrating the use or depreciating the value of land; instead, it involves an effort to *change* a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council. Thus, this case involves an owner's seeking approval of a new use free from the restrictions attached to the land *when it was acquired.* (Emphasis added).

The commercial zoning classification associated with Petitioner's property for over thirty (30) years was presumptively valid. *Nectow,* 277 U.S. at 188; *Euclid,* 272 U.S. at 388. All that Mr. Turner has sought to do in the proceedings described herein is have his property placed back in its original zoning classification which is compatible with its actual use. He merely asks the government to return to him what was improperly taken away; he does not seek

a zoning classification that is "free from the restrictions attached to the land when it was acquired." *Id.* This important distinction warrants much closer scrutiny of the governmental action than the situations in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Agins v. Tiburon*, 447 U.S. 255 (1980).[7]

Failing to recognize this significant distinction, the Georgia Supreme Court impermissibly placed the burden of proof upon Mr. Turner and never determined whether the police power was validly exercised. (Appendix A, p. A6) (Smith, J. dissenting). Once the City of Atlanta downzoned Mr. Turner's property without notice, and Mr. Turner proved that he sustained a "significant detriment,"[8] the City of Atlanta was required to come forward with evidence showing that the downzoning "substantially advanced a legitimate state interest." *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (June 26, 1987); *see also* Appendix A, p. A7 (Smith, J. dissenting). In this case the Supreme Court of Georgia refused to consider whether the City of Atlanta, either substantially or insubstantially, advanced any state interest. (Appendix A, pp. A6-A7).

The City of Atlanta attempted to justify its actions by later amending the permitted uses under the office and institutional zoning classification to permit motels

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7. The party challenging the zoning ordinance in *Euclid* owned 68 acres of *vacant* land and in *Agins* owned five acres of *unimproved* land. 272 U.S. at 384; 447 U.S. at 257. Furthermore, in both cases the issue of whether proper notice of the zoning ordinance was given was not in dispute.

8. In addition to the uncontradicted evidence that his property lost at least $154,000 in value because of the downzoning, Mr. Turner was not permitted to place a billboard on the property, he could not further expand the motel nor could he use his property for any other commercial use or even sell it for its fair commercial value. (T. 26, 40-42, 50-51, 142-45).

not exceeding thirty (30) rooms. (Mr. Turner's motel has twenty-nine (29) rooms). (T. 142). The Georgia Supreme Court was apparently persuaded because it emphasized in the second sentence of its opinion that "[t]he actual use of the property as a motel remained unchanged". (Appendix A, p. A1). This Court has noted, however, that:

> A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

Penn Central, 438 U.S. at 149-150. (Rehnquist, J. dissenting). Even assuming *arguendo* that the "taking" was limited to the period of time from January 1, 1982 to November 23, 1983, clearly a "temporary" regulatory taking has occurred for which Petitioner is entitled to be compensated. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 107 S.Ct. 2378 (June 9, 1987). The City of Atlanta's attempt to justify its unconstitutional actions by amending the permitted uses to allow motels up to thirty rooms is "an exercise in cleverness and imagination" which is not sufficient to satisfy the Fifth Amendment. *Nollan,* 107 S.Ct. at 3150.

2. The Notice Issue

The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that adequate notice be given prior to an action which will affect an interest in life, liberty or property. This Court in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950), held that a state must provide

"notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The City of Atlanta's failure to provide Petitioner with any notice prior to the downzoning of his property does not satisfy the requirements of the Due Process Clause.

While this Court has not addressed the precise question of what type of notice is required by a state when it downzones improved commercial property, the case of *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983), is controlling. In *Mennonite* this Court invalidated a tax sale in which the only notice given was the posting of a notice of the sale in the county courthouse and the publishing of a notice in the newspaper once each week for three weeks. *Id.* at 793. This Court in *Mennonite* applied the *Mullane* analysis and held that notice by publication and posting was not constitutionally sufficient and "did not meet the requirements of the Due Process Clause of the Fourteenth Amendment." *Id.* at 800. In this case the City of Atlanta did not even attempt notice by publication or posting.

As acknowledged by the dissenting opinion in *Mennonite,* this Court held that:

> [W]*henever* a party has a legally protected property interest, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests . . . if [the party's] name and address are reasonably ascertainable." *Ante,* at 800.

Id. at 802. The record in this case is undisputed that individual notice was not given to Petitioner, nor was it

even attempted. Furthermore, the City of Atlanta did not even provide Petitioner with notice by publication. (T. 103). The only notice that was given was that discussing the 1982 Atlanta Zoning Ordinance in general terms. The general notice given did not identify Petitioner's property nor was it "reasonably calculated" to notify Petitioner that his property was being downzoned. *Mullane,* 339 U.S. at 314. (T. 103).

At the trial the Atlanta Zoning Administrator admitted that at "all times the City was aware that Mr. Turner's property was improved property consisting of a 29-unit motel." (T. 66). He also admitted that it would have been possible to give individual notice to affected property owners, but that he did not know how much time or expense would be involved. (T. 99-100). This Court noted in *Walker v. City of Hutchinson,* 352 U.S. 112, 116 (1956), that:

> [T]here seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken . . . .

In this case, with Petitioner's name and address available, at a constitutional minimum, the City of Atlanta was required to send Petitioner a letter notifying him of its intended action.

The City of Atlanta has attempted to justify its failure to give proper notice because the 1982 Atlanta Zoning Ordinance was a comprehensive ordinance which affected a large number of parcels, and that individual notice allegedly would have been too expensive. (T. 67). Of the parcels affected by the 1982 Atlanta Zoning Ordi-

nance, however, "the huge majority", or approximately ninety-five (95%) percent, remained unchanged or upgraded zoning classifications to a less restrictive use. (T. 94). Furthermore, of the five (5%) percent of parcels that were downzoned, like Petitioner's property, many consisted of undeveloped property. (T. 94). Therefore, only a very small number of property owners were subjected to action by the City of Atlanta which downzoned improved commercial property. This Court has required notice by mail where the rights of over one hundred individuals were involved. *Mullane,* 339 U.S. at 309.

Significantly, even if "notice by publication" were constitutionally sufficient in a zoning case, which directly contradicts this Court's holding in *Mennonite,* the general newspaper description of the 1982 Atlanta Zoning Ordinance was not sufficient "notice by publication." Notice by publication must, at a minimum, specify the particular property involved. *See e.g. Adler v. Lynch,* 415 F.Supp. 705 (D. Neb. 1976) (where proceeding not specifically mentioned, notice was constitutionally insufficient). The record clearly and unequivocally reflects that such notice was not provided. (T. 103).

REASONS WHY THIS COURT SHOULD GRANT PETITIONER'S WRIT FOR CERTIORARI

As Justice Stevent described in his dissenting opinion in *Moore,* this Court did not review the substance of any zoning ordinances from 1928 until 1972, almost forty-five (45) years. *Moore,* 431 U.S. at 514. Since that time the focus of this Court in examining Fifth Amendment "taking" issues has wisely shifted from the application of various tests such as "physical invasion" and "noxious use" to a "justice and fairness" analysis. This case is appropriate

for review because a state may not, consistent with the requirements of "justice and fairness," downzone improved and developed commercial property without notice and without a showing that its actions "substantially advance a legitimate state interest." *Nollan,* 107 S.Ct. at 3150.

The Supreme Court of Georgia has decided this case in a manner which clearly conflicts with this Court's recent decisions in *Nollan* and *First English Church* and with numerous other decisions addressed heretofore. Because of the importance of *Nollan* and *First English Church,* and the uncertainty of their full ramifications, this case presents the Court with an ideal opportunity to provide further guidance on the extent to which unreasonable regulatory conduct can usurp individual rights.

Additionally, whether a state may constitutionally downzone improved commercial property, when it enacts a comprehensive rezoning ordinance, without providing individual notice to the affected property owners, or at least notice by publication which identifies the property, has not been addressed by this Court. This important Fourteenth Amendment Due Process issue has not been settled by this Court and is ripe for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have caused to be served the necessary copies of this petition on

Robert L. Zoeckler
Attorney for the City of Atlanta
Suite 1100 South Tower
One CNN Center
Atlanta, Georgia 30303-2705

by causing the printer to place said copies in the United States mail, postage prepaid.

I further certify that all parties required to be served have been served.

This 27th day of October, 1987.

JAMES D. MEADOW

APPENDIX

APPENDIX A

In the Supreme Court of Georgia

Decided: July 16, 1987

44233. TURNER v. CITY OF ATLANTA.

WELTNER, Justice.

Turner's commercial property was rezoned to office-institutional use by the city's adoption of a comprehensive development plan. The actual use of the property as a motel remained unchanged. Turner attempted to have the zoning changed back to a commercial classification. He claimed that the city's failure to provide personal notice of a proposed change in zoning was violative of its own procedures and violative of due process as well. He also attacked the constitutionality of the ordinance on the ground that by rendering his property unmarketable, it took his property without just and adequate compensation. The city denied his rezoning request and the trial court affirmed the denial, finding the ordinance constitutional.

1. The trial court found that the city complied with its notice procedure relative to the adoption of the comprehensive zoning ordinance, and that the procedure was constitutionally sufficient. We agree. The city was not required under the applicable ordinance to give personal notice for a comprehensive zoning plan. The constitutional claim is controlled by *Willingham v. White*, 229 Ga. 75 (189 SE2d 442) (1972) and *Wilson v. City of Snellville*, 256 Ga. 734, 735 (..... SE2d .....) (1987).

2. The trial court concluded that Turner did not show that he would suffer a significant detriment under the standards set forth in *Gradous v. Board of Commissioners,* 256 Ga. 469, 470 (349 SE2d 707) (1986). This, too, we affirm. "The findings indicated no detriment to appellant except for the fact that the property would be more valuable if rezoned." *Gradous,* 256 Ga. at 472. "It is not sufficient to show that a more profitable use could be made of the property." *Avera v. City of Brunswick,* 242 Ga. 73, 75 (247 SE2d 868) (1978). Furthermore, the present zoning comports with the comprehensive development plan. See *Moore v. Maloney,* 253 Ga. 504, 506 (2) (321 SE2d 335) (1984).

Judgment affirmed. All the Justices concur, except Gregory, J. who concurs in the judgment only, and Smith and Bell, JJ., who dissent.

44233. TURNER v. CITY OF ATLANTA

SMITH, J., dissenting.

Apparently gone are the days when the government can run willy-nilly over individual's property rights. This country, among other things, was founded upon the principle of privacy in one's personal life and respect for one's property rights. At the turn of the century, property rights were valued and received special judicial attention. In the decades that followed, however, the judiciary's interest increased as to individual rights and property rights became the stepchild of judicial interest as the unchecked police power of government expanded. One's monetary interest in his property, home, or business is as much a part of his constitutionally protected right as is his privacy interest in not having his home or property searched without a warrant. Two recent Supreme Court cases reflect a dramatic change in the way individual property rights are now being viewed. See, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 55 LW 4781, (1987). *Nollan v. California Coastal Commission*, 55 LW 5145 (1987). These cases plainly imply that if the government takes property, whether in the form of a physical taking or a regulatory taking, by zoning or otherwise, be it temporary or permanent, partial or whole, the government must compensate the citizen for the taking.

This Court in *Barrett v. Hamby*, 235 Ga. 262 (219 SE2d 399) (1975), made a giant step forward when it stated that the law will require zoning authorities to justify zoning ordinances. Here, just as in *Barrett*, the justification is missing. Clearly our Court has said that

the zoning authority must prove justification in taking and by something more than any evidence. Id. at 265, see also *DeKalb County v. Flynn,* 243 Ga. 679, 680 (256 SE2d 362) (1979).

Mr. O. L. Turner, operates a motel on two acres of land in Atlanta, Georgia. When he purchased the property in 1962, it was zoned for commercial use. During the summer of 1983, when he was denied a permit to erect a billboard on part of his property, he discovered that his property, with a fully operating motel thereon, had been down zoned into a nonconforming use. The new classification, O-I, office-industrial, is a more restrictive use. An expert testified that the property in the original classification, before down zoning, was worth $230,000 and after the down zoning was worth $76,000. He also testified that the property was less marketable in the down zoned classification. Furthermore, Mr. Turner could no longer obtain a permit for a billboard under the new classification, and he could not expand his motel.

The majority relies on *Gradous v. Board of Commissioner*, 256 Ga. 469, 470 (349 SE2d 707) (1986), but *Gradous* is based on a long line of cases in which landowners sought to have presumptively valid zoning classifications changed, thereby increasing the value of the property they sought to have rezoned.

The reason the trial court decision in *Gradous* was affirmed was because this Court agreed, as it has so many times in the past, that there was no detriment to the landowner except for the fact that "the property *would be more valuable if rezoned* . . . . [and that t]here was no showing that there *had been any decrease in value,* . . ." Id. at 472. (Emphasis supplied.) Implicit in the analysis is the understanding that the owner had suffered *no de-*

crease in value due to the zoning, thus no detriment. The Court in *Gradous* cited *DeKalb County v. Albritton Properties,* 256 Ga. 103 (344 SE2d 653) (1986) where the Court found a significant deprivation because there was a "downturn in viability . . . and [a foreseeable] sharper downturn *of land value* . . . ." Id. at 108. (Emphasis supplied.) This case is unlike *Gradous* where there was only a showing that the property would be "more valuable if rezoned . . . [and no showing of] *any decrease in value* . . ." Id. at 472. (Emphasis supplied.) Mr. Turner showed that because of the pre-existing zoning his property had a value that was drastically decreased due to the government action, as well as an inability to use his property as profitably as before it was down zoned. He showed a present *decrease in land value* and use, due entirely to the down zoning, not merely a foreseeable one.

This case, is a "reverse *Gradous*" situation. Mr. Turner's property was zoned in a presumtively valid manner from the time he purchased it, over twenty years ago, until the time when the city down zoned it without individual notice to him. The down zoning caused his motel to become a nonconforming use and the value of his property plummeted overnight from $230,000 to $76,000.

Mr. Turner unsuccessfully argued in the lower court that his rights were violated when the city down zoned his property without providing him with notice. He also asserted that the rezoning took his property without just and adequate compensation. This Court upholds the trial court's decision by agreeing with the trial court that Mr. Turner "did not show *that he would suffer* a significant detriment under the standards set forth in *Gradous v. Board of Commissioners,* 256 Ga. 469, 470 (349 SE2d 707) (1986)." (Emphasis supplied.)

The trial court and this Court ignore the fact that Mr. Turner had a vested interest in the value of his property as it existed under the presumptively valid pre-existing zoning and that he suffered a significant detriment when down zoned. He presented clear and convincing evidence showing the detriment he suffered, and that was all he was required to do to shift the burden to the city to justify the rezoning.

In analyzing a problem like the one before us, we are supposed to use a balancing test to determine whether the police power has been properly or improperly exercised. The test is designed to weigh the benefit to the public against the detriment or burden to the individual. The benefits and burdens cannot be properly weighed if there is a refusal to acknowledge or examine the burden to the landowner when his property is devalued by the governing authority. Likewise, if this Court improperly places the burden of proof upon the landowner, the tipping of the scales prevents a proper weighing of the benefits and the burdens.

This is what I believe to be the proper constitutional burden. We begin with a presumption of validity. The burden was on Mr. Turner to come forward with clear and convincing evidence that the zoning presented a significant detriment to him. The burden then should have shifted to the governing authority to come forward with evidence showing that the regulation it wished to impose substantially advanced the legitimate state interest sought to be achieved. See *Nollan,* supra.

One of the most fundamental reasons for allowing governing authorities the power to regulate the use of individual's property is to provide stability. When zoning ordinances are enacted and relied upon by individual land-

owners, rezoning by the governing authority should only be effectuated when: the zoning authority shows prior to the rezoning that the original zoning regulations were improper, or changes in the surrounding areas require rezoning to substantially advance a legitimate state interest.

Here Mr. Turner presented clear and convincing evidence of a substantial detriment. At that point the city should have been required to show that the zoning regulation substantially advanced the legitimate state interest sought to be achieved. If the state was unable to do so, it should have returned his property to the former classification. If the city could have justified the down zoning, then it would have taken a property right for which it must pay compensation.

But in either event whether Mr. Turner made his point or the city made its point, when the city down zoned the property it took Mr. Turner's property right amounting to $154,000, the difference in value of the land immediately before and after the down zoning. If the city refuses to pay, then Mr. Turner has a constitutional right to sue for damages for the "decrease in value" of his land due to down zoning. See *Gradous*, supra.

I respectfully dissent.

APPENDIX B

(Filed August 14, 1987)

44233

SUPREME COURT OF GEORGIA

Atlanta July 29, 1987

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

O. L. TURNER V. CITY OF ATLANTA

Upon consideration for the motion for reconsideration filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Smith and Bell, JJ, dissent and Gregory, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta August 14, 1987

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Hazel E. Hallford, Deputy Clerk

APPENDIX C

(Filed July 9, 1986)

IN THE
SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

O. L. TURNER,	)	
Plaintiff	)	CIVIL ACTION,
v.	)	FILE NO. D-12117
CITY OF ATLANTA,	)	
Defendant	)	

ORDER

The above styled case having come on for hearing and the parties having submitted briefs and presented evidence and argument, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

O. L. Turner, planitiff, is the owner of the property which is the subject matter of this action. The property is located at 1650 Stewart Avenue, Atlanta, Fulton County, Georgia, at Land Lot 89, in the 14th District of Fulton County (hereinafter referred to as the "Turner Property").

2.

The Turner Property, which has been owned by O. L. Turner since 1962, is occupied with a 29 unit motel.

3.

Until 1982 the Turner Property was zoned "C-1" and "C-2" (commercial designations).

4.

On December 15, 1980 the Atlanta City Council adopted the Atlanta Zoning Ordinance effective January 1, 1982, which changed the zoning of the Turner Property from "C-1" and "C-2" to "O-I". The motel on the property became a legal non-conforming use as at that time motel uses were not permitted in O-I districts. In November 1983 the text of the zoning ordinance provision with regard to O-I uses was changed to permit motel uses up to 30 units at which time the motel use on the subject property became a legal conforming use under the O-I classification.

5.

This Court finds the Atlanta Zoning Ordinance adopted December 15, 1980 is a comprehensive zoning scheme. The zoning ordinance affected the entire City and changed the zoning designation of approximately 20,000 parcels of land.

6.

The City determined, based upon costs and manpower consideration, that it would not send out individual notices to each property owner, including the Turner Property, informing them of the proposed change nor would it post signs on the parcels identifying them as being subject to rezoning.

7.

General notice was provided to the public at large through the use of various public hearing procedures and media dissimination strategy. Public hearings were held in each of the 24 neighborhood planning unit (NPU) meeting locations in the City of Atlanta, at which time the text and map of the new ordinance was presented. Public hearings were held before the Zoning Review Board of the City of Atlanta after notice through advertisement in various local newspapers. In addition, news stories were carried during the entire period 1979 and 1980 which discussed various aspects of the new zoning ordinance on both radio and television and in local newspapers. Also, the text and maps of the new ordinance were made available to any member of the public to review. The new zoning ordinance was adopted at the final meeting in December, 1980 and a one year "get acquainted" period was permitted during calendar year 1981 before the new zoning ordinance went into effect on January 1, 1982.

8.

The evidence indicates the purpose of rezoning the Turner Property was to make it conform to the projected use of the area. The Atlanta Junior College virtually surrounds the Turner Property. Except for the property immediately south of plaintiff's property, which is zoned C-2-conditional, all the surrounding properties are zoned O-I.

9.

In the summer of 1983, plaintiff entered into a lease with National Advertising whereby National Advertising would place a billboard on the Turner Property and would make annual lease payments to plaintiff. When plaintiff and National Advertising applied for a permit to erect

the billboard, their request was denied because the Turner Property was no longer zoned "C-1" and "C-2".

10.

On May 9, 1984, after unsuccessfully attempting to convince the City of Atlanta to place his property back in its original compatible zoning classification of "C-1" and "C-2", plaintiff submitted an Application for Rezoning. Plaintiff challenged the constitutionality of the Ordinance which rezoned the Turner Property from "C-1" and "C-2" to "O-I" before both the Planning Commission and the City Council of the City of Atlanta.

11.

On June 1, 1984, the City of Atlanta, by and through its City Council, denied plaintiff's Application for Rezoning.

CONCLUSIONS OF LAW

1.

The Court concludes that a zoning ordinance is presumptively valid and this presumption may be overcome only by clear and convincing evidence. *Avera v. City of Brunswick*, 242 Ga. 73 (1978). The burden is on the person seeking to change the zoning to show the invalidity of the ordinance. See, *Avera*, supra.

2.

Section 16-36001(b) of the 1976 Atlanta Zoning Ordinance provides that "All the procedures prescribed by law for the adoption of a comprehensive zoning text and maps shall be followed and the requirements for public hearing, public notice and advertisement applicable thereto

shall apply to such annual amendment. None of the procedures set forth in Chapter 36 of the Zoning Ordinance of the City of Atlanta which are not required for initial adoption of a comprehensive zoning plan and maps shall apply to such annual ordinance."

3.

This Court concludes the notice provisions plaintiff urges on the Court as being required in the present case are specifically exempted by the language of §16-36001(b).

4.

The City complied with the notice provisions of the 1976 Zoning Ordinance. The notice which was required by the ordinance and which was provided was sufficient under federal and state constitutional law. Consequently this Court concludes plaintiff has not been deprived of property rights without due process of law in the adoption or implementation of the comprehensive new zoning ordinance of 1982. See, *Scofield v. Bishop*, 192 Ga. 732 (1941); *Howden v. City of Savannah*, 172 Ga. 833 (1931); *Willingham v. White*, 229 Ga. 74 (1972); *F.P. Plaza v. Waite*, 230 Ga. 161 (1973); and *Seaboard System Railroad v. Bankester*, 254 Ga. 455 (1985).

5.

The acts of a governing body of a municipality exercising zoning power will not be disturbed by the court unless they are clearly arbitrary and unreasonable. See, *Avera v. City of Brunswick*, supra; *Flournoy, et al. v. City of Brunswick*, 248 Ga. 573 (1981).

6.

The Court concludes that plaintiff has failed to carry the burden of showing that the existing O-I zoning is both

arbitrary and unreasonable. *Avera* and *Flournoy*, supra. The evidence with regard to the existing office institutional uses and the character of the neighborhood, the compatibility with surrounding zoning uses and developments and public improvements, shows the O-I zoning is not arbitrary and unreasonable especially since plaintiff is permitted to operate in the manner it has previously operated in conformity with the zoning. The evidence that the zoning is in conformity with the City adopted land use plan and adheres to long range land use planning determination in existence shows that the existing zoning is not arbitrary. *Hubert Realty Co. v. Cobb County Board of Commissioners*, 245 Ga. 236 (1980); *Koppar Corp.* v. *Griswell*, 246 Ga. 539 (1980); *Johnson v. Glenn*, 246 Ga. 685 (1980); *DeKalb County v. Blalock Machinery & Equipment Co., Inc.*, 247 Ga. 671 (1981).

7.

The Court further concludes that plaintiff made a showing that the subject property, if zoned commercial, would be more profitable than if the property remained as presently zoned. However, the Court further concludes that to establish arbitrariness and unreasonableness, it is not sufficient to show that a more profitable use could be made of the property. See, *DeKalb County v. Blalock Machinery & Equipment Co., Inc.*, supra, and *Flournoy v. City of Brunswick*, supra. Further any adverse effect on plaintiff is offset by the gain to the public, since the O-I zoning promotes the public health, safety, morals and general welfare.

8.

Plaintiff must carry the burden of showing that the zoning under attack is so detrimental to him, and so

insubstantually related to the public health, safety, and morality and welfare as to amount to an unconstitutional "taking", that is, an arbitrary confiscation of property without compensation by the governmental authority. See, *Guhl v. M.E.M. Corp.*, 242 Ga. 354 (1978). The Court concludes that the evidence introduced by plaintiff herein is insufficient to establish or meet the burden of showing a significant loss and insubstantial public benefit. See, *Flournoy*, supra.

9.

The Court concludes that plaintiff has failed to submit clear and convincing evidence which would overcome the presumption of validity of the O-I zoning ordinance as applied to this property. Further, plaintiff has failed to show that the acts of the governing body of the City of Atlanta in exercising its zoning powers are clearly arbitrary and unreasonable. See, *Avera*, supra.; *Westbrook v. Board of Adjustment*, 245 Ga. 15 (1980); and *Hyde v. Smith*, 153 Ga. App. 521 (1980).

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that the Appeal of plaintiff be and the same is hereby DENIED and the Clerk is hereby ORDERED to enter judgment in favor of the defendant.

So ORDERED this 9th day of July, 1986.

/s/ Ralph H. Hicks
Ralph H. Hicks, Judge
Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX D

(Filed June 27, 1984)

IN THE
SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

O. L. TURNER,	)	
Plaintiff,	)	CIVIL ACTION
- v -	)	FILE NO. .....
THE CITY OF ATLANTA,	)	
Defendant.	)	

COMPLAINT

COMES NOW O. L. TURNER, and files this Complaint for Declaratory and Equitable Relief against the CITY OF ATLANTA, and respectfully shows the Court the following:

1.

Defendant CITY OF ATLANTA is a municipal corporation chartered under the laws of the State of Georgia, and is subject to the jurisdiction of this Court.

2.

Plaintiff is the owner of two tracts of land located at 1650 Stewart Avenue, S.W., at Land Lot 89, in the 14th District of Fulton County ("Turner Property") which is more particularly described as follows:

> All that tract or parcel of land lying and being in Land Lot 89 of the 14th District of Fulton County, Georgia; and being more particularly described as follows:

BEGINNING at a point marked by an iron pin on the easterly side of Stewart Avenue, three hundred sixty-eight and twenty-five hundredths (368.25) feet southerly, as measured along the easterly side of Stewart Avenue, from the corner formed by the intersection of the easterly side of Stewart Avenue and the southerly side of Claire Drive; thence easterly along a line forming an interior angle of 89° 49′ with the easterly side of Stewart Avenue, and along a 10-foot alley, three hundred fifty (350) feet to an iron pin; thence northerly ninety and eight-tenths (90.8) feet to an iron pin on the easterly side of Stewart Avenue, a portion of which distance is along the southerly side of a one-foot rock wall; thence southerly along the easterly side of Stewart Avenue ninety-one and five-tenths (91.5) feet to the point of beginning; being a portion of that property deeded by Mrs. F. A. Barfield to Grantor by deed dated June 21, 1967, and recorded in Deed Book 3234, page 74, Fulton County Records; and being improved property known as 1650 Stewart Avenue, Atlanta, Georgia.

TOGETHER WITH

All that tract or parcel of land lying and being in Land Lot 89 of the 14th District of Fulton County, City of Atlanta, Georgia and being more particularly described as follows:

BEGINNING at a point on the east side of Stewart Avenue, 134 feet south of the southeast intersection of Claire Drive and Stewart Avenue, thence running east, a distance of 200 feet to an iron pin; thence running south a distance of 40 feet to an iron pin; thence running east a distance of 150 feet to an iron

pin; thence running south a distance of 103.45 feet to an iron pin; thence running west a distance of 350 feet to an iron pin located on the east side of Stewart Avenue; thence running north along the east side of Stewart Avenue, a distance of 142.75 feet to the point of beginning, being improved property known as No. 1650 Stewart Avenue, according to the present system of numbering in the City of Atlanta, Georgia.

3.

The Turner Property was zoned Community Business District ("C-1") for approximately sixty years before January 1, 1982.

4.

For approximately twenty-two years plaintiff has operated a motel on said property which continues to operate as a going business.

5.

On January 1, 1982 the City Council of the City of Atlanta adopted a comprehensive development plan (the "CDP" which changed the zoning of plaintiff's property from C-1 to an Office-Institutional district ("O-I").

6.

No notice was given to plaintiff that his property was being rezoned and plaintiff did not discover the rezoning of his property until 1984.

7.

While the present size of the motel is consistent with O-I zoning, the motel cannot be expanded in that zoning classification.

8.

In the area of the city where plaintiff's property is located, commercial property or property zoned C-1 has a far greater value than property for Office-Institutional, or O-I zoning. After learning of the action of the City rezoning his property, plaintiff, on May 9, 1984, submitted an application for rezoning requesting that his property be placed back in its original classification of C-1. (A true and correct copy of plaintiff's rezoning application is attached hereto as Exhibit "A" and incorporated herein.)

9.

Plaintiff was informed and believes that the property was placed in an O-I zoning category by the City inadvertently, the staff of the Zoning Department believing that the property they were changing from C-1 to O-I was unimproved property belonging to persons other than the plaintiff.

10.

On or about June 1, 1984 the City, by and through the City Council of the City of Atlanta, arbitrarily, unreasonably, capriciously and in abuse of its discretion, summarily rejected and denied plaintiff's application for rezoning.

11.

The zoning ordinance of the City of Atlanta which placed the Turner Property in the O-I zoning classification is, as applied to the Turner Property, arbitrary, unreasonable and confiscatory, and its application to the Turner Property is unconstitutional, null and void in that it was enacted without notice to plaintiff and in that it prohibits the use of the Turner Property for the only use for which the property is reasonably and economically suited, to wit:

commercial use; and the zoning classification has the effect of freezing the Turner Property in its present condition; thus the application of the present zoning restrictions to the Turner Property is equivalent to an unlawful confiscation of plaintiff's valuable property rights in the Turner Property without the prior payment of just compensation therefor, and since the Turner Property is unsuitable for the purpose as classified and no notice was given, the zoning ordinance is unconstitutional in violation of Article I, Section 1, Paragraph 1 of the Georgia Constitution, Article I, Section 3, Paragraph 1 of the Georgia Constitution and the due process clause of the Fourteenth Amendment of the Constitution of the United States, and results in no gain or benefit to the public while inflicting serious injury and loss on plaintiff.

12.

The refusal of the City of Atlanta to approve plaintiff's application for rezoning to place plaintiff's property back in its original classification, which would be consistent with the current and anticipated use of the property, was arbitrary, unreasonable and confiscatory, and its application to the Turner Property is unconstitutional, null and void in that it restricts and prohibits the use of the Turner Property for the use for which the property is reasonably and economically suited, to wit: commercial use; and the zoning classification which the City has placed upon the property has the effect of freezing the Turner Property in its present condition, prohibiting the expansion of the current use and the application of the present zoning therefore is equivalent to an unlawful confiscation of plaintiff's valuable property rights without the prior payment of just compensation therefor, and is therefore unconstitutional and in violation of Article I, Section 1, Paragraph 1 of the

Georgia Constitution, Article I, Section 3, Paragraph 1 of the Georgia Constitution, and the due process clause of the Fourteenth Amendment of the Constitution of the United States, and results in no gain or benefit to the public while inflicting serious injury and loss on plaintiff.

13.

The constitutional issues raised herein were raised before the City Council of the City of Atlanta, both in the presentation made on behalf of plaintiff before the Zoning Review Board of the City of Atlanta and by letters to the City Council which are hereto attached as Exhibits "B" and "C" and by reference incorporated herein.

WHEREFORE, plaintiff prays that he be granted the following relief:

(a) That process be issued, served upon defendants, and that defendants answer this Complaint as provided by law;

(b) That the zoning ordinance of the City of Atlanta be declared null and void in its application to the Turner Property more particularly described in paragraph 2 of this Complaint.

(c) That the decision to reject the proposed rezoning change be declared null and void and violative of O. L. Turner's constitutional rights;

(d) That the Court adjudge and decree that the only use for the aforedescribed property be commercial and business use;

(e) That defendant be ordered to give immediate consideration to the Turner Property and reclassify it as soon as practicable or on a day certain under a rezoning classi-

fication which would not violate O. L. Turner's constitutional rights and deprive the Turner Property of its reasonable use; and

(f) That plaintiff receive such further relief deemed by this Court to be just and proper.

/s/ Frank Love, Jr.
Frank Love, Jr.
/s/ James D. Meadows
James D. Meadows

Powell, Goldstein, Frazer & Murphy
1100 C&S National Bank Building
35 Broad Street, N.W.
Atlanta, Georgia 30335
(404) 572-6600

EXHIBIT "A"

No. .....

(Received March 9, 1984)

APPLICATION FOR REZONING

(This application must be typewritten)

City Council
City of Atlanta
Atlanta, Georgia
Gentlemen:

I, (We) the undersigned, respectfully request that the property hereinafter described be rezoned from O-I to C-1

1. DESCRIPTION OF PROPERTY INVOLVED:

   Address 1650 Stewart Avenue, S.W.

   Property fronting 234.25 feet on the Eastern side of Stewart Avenue, beginning 134.00 feet from the Southwest corner of Claire Drive

   Depth of lot: 350.0 Feet Area: ..... acres or 75.985.50 square feet

   LEGAL DESCRIPTION OF PROPERTY (Use separate sheets of paper if necessary): All That tract or parcel of land lying and being in land lot

   See Exhibit A Attached Hereto

2. APPLICANT AND OWNERSHIP INFORMATION (if more than one owner, applicant or both, use additional sheets of paper):

(a) Owner Mr. O. L. Turner

Address 1520 Farnell Court, Apt. 1831
Decatur, Georgia 30033 325-392
Zip Code Telephone #

(b) Applicant Mr. O. L. Turner

Address 1520 Farnell Court, Apt. 1831
Decatur, Georgia 30033 325-392
Zip Code Telephone #

NOTE: If A and B are not the same, Affidavit A or B must be completed

3. STATEMENT OF NECESSITY (Use separate sheets of paper): *See* Exhibit B Attached Hereto

Statement explaining why proposed rezoning is requested and for what purpose property will be used should request be granted:

(The Atlanta Zoning Ordinance requires that rezoning may be effected *only* when public necessity, public convenience, general welfare or good zoning practice demands such changes.).

4. AUTHORIZATION TO INSPECT PREMISES.

The undersigned hereby authorizes the staff of the Bureau of Planning to inspect the site which is the subject of this application.

/s/ (Illegible)
Signature of owner or agent

AFFIDAVIT:

Personally appeared before me
/s/ O. L. Turner
who on oath deposes and says that
the above is true to the best of
his or her knowledge and belief.
/s/ Gay L. Sharp
Signature of Notary Public
Date 3/9/84
Notary Public, Georgia, State at Large
My Commission Expires June 9, 1986

AFFIDAVIT "A"

This Application Must Be Typewritten

I the undersigned, certify that I am the owner of the property described above, as shown by the records of Fulton County, and authorize Frank Love, Jr. (Address) Powell, Goldstein, Frazer & Murphy, 1100 C&S National Bank Building, Atlanta, Ga. 30335 Telephone 572-6608 as agent to act in the pursuit of the (X) re-zoning ( ) variance or ruling ( ) special use permit of this property.

AFFIDAVIT

Personally appeared before me
/s/ O. L. Turner
who on oath deposes and says
that the above is true to the
best of his or her knowledge
and belief.
/s/ Gay L. Sharp
Signature of Notary Public
Date 3/9/84
Notary Public, Georgia, State at Large
My Commission Expires June 9, 1986

SIGNATURES OF OWNER OR OWNERS:
/s/ (Illegible)
(signatures must be notarized)

AFFIDAVIT "B"

I certify that as an Attorney at Law, I have been authorized by the owner to act in the pursuit of the (X) rezoning ( ) variance or ruling ( ) special use permit of the property described in this application.

Frank Love, Jr.
Name of Attorney-at-Law
Powell, Goldstein, Frazer & Murphy
1100 C&S National Bank Building
Atlanta, Georgia 30335
Address
572-6608
Telephone
/s/ Frank Love, Jr.
Signature of Attorney-at-Law

EXHIBIT A

LEGAL DESCRIPTION

All that tract or parcel of land lying and being in Land Lot 89 of the 14th District of Fulton County, Georgia; and being more particularly described as follows:

BEGINNING at a point marked by an iron pin on the easterly side of Stewart Avenue, three hundred sixty-eight and twenty-five hundredths (368.25) feet southerly, as measured along the easterly side of Stewart Avenue, from the corner formed by the intersection of the easterly side of Stewart Avenue and the southerly side of Claire Drive; thence easterly along a line forming an interior angle of 89° 49′ with the easterly side of Stewart Avenue, and along a 10-foot alley, three hundred fifty (350) feet to an iron pin; thence northerly ninety and eight-tenths (90.8) feet to an iron pin; thence westerly three hundred fifty (350) feet to an iron pin on the easterly side of Stewart Avenue, a portion of which distance is along the southerly side of a one-foot rock wall; thence southerly along the easterly side of Stewart Avenue ninety-one and five-tenths (91.5) feet to the point of beginning; being a portion of that property deeded by Mrs. F. A. Barfield to Grantor by deed dated June 21, 1967, and recorded in Deed Book 3234, page 74, Fulton County Records; and being improved property known as 1650 Stewart Avenue, Atlanta, Georgia.

TOGETHER WITH

All that tract or parcel of land lying and being in Land Lot 89 of the 14th District of Fulton County, City of Atlanta, Georgia and being more particularly described as follows:

BEGINNING at a point on the east side of Stewart Avenue, 134 feet south of the southeast intersection of Claire Drive and Stewart Avenue, thence running east, a distance of 200 feet to an iron pin; thence running south a distance of 40 feet to an iron pin; thence running east a distance of 150 feet to an iron pin; thence running south a distance of 103.45 feet to an iron pin; then running west a distance of 350 feet to an iron pin located on the east side of Stewart Avenue; thence running north along the east side of Stewart Avenue, a distance of 142.75 feet to the point of beginning, being improved property known as No. 1650 Stewart Avenue, according to the present system of numbering in the City of Atlanta, Georgia.

EXHIBIT B

3. STATEMENT OF NECESSITY

This property was rezoned by the City from C-1 to O-I without the knowledge of the owner. The property is improved property with an operating motel, which is inconsistent with O-I zoning. The owner desires that the original and compatible zoning be restored to the property.

EXHIBIT "B"

POWELL, GOLDSTEIN, FRAZER & MURPHY
Attorneys at Law
Eleventh Floor
The Citizens & Southern National Bank Building
35 Broad Street, N.W.
Atlanta, Georgia 30335

404 572-6600
Telex 542-864
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Telecopier 404 572-6999
Cable PGFM

Suite 1050
1110 Vermont Avenue, N.W.
Washington, D.C. 20005
202 347-0066

May 24, 1984

The City Council of Atlanta
City Hall
68 Mitchell Street, S.W.
Atlanta, Georgia 30335

Re: Mr. O. L. Turner's Application
for Rezoning - No. Z-84-22

Dear Ladies and Gentlemen:

This firm represents Mr. O. L. Turner, a property owner and taxpayer in the City of Atlanta, who seeks to have his property rezoned to its original and compatible zoning classification. Mr. Turner owns property at 1650 Stewart Avenue, located in Land Lot 89 of the 14th

District of Fulton County, Georgia ("Turner property"), which includes an improved operating motel, known as the Oaks Motor Court, which has been in business for approximately 60 years.

Although the Turner property was zoned Commercial ("C-1") for over sixty years, it was rezoned, without any notice whatsoever to Turner, to Office and Institutional ("O-I") when the City of Atlanta enacted a Comprehensive Development Plan ("CDP").

The City of Atlanta Zoning Office informed us on March 13, 1984, that the Zoning Office's records reflected that the Oaks Motor Court was located at 1660 Stewart Avenue and was still zoned commercial, and that the tracts of land shown on the plat attached to Mr. Turner's rezoning application were vacant. In reality, the Oaks Motor Court's address is 1650 Stewart Avenue (not 1660 Stewart Avenue) and it is located on the plat attached to Mr. Turner's rezoning application. We believe that the Turner property was erroneously rezoned from C-1 to O-I because it was believed to be a vacant tract of land owned by the Atlanta Area Technical School ("Technical School"). This is further supported by the fact that the Technical School owns a vacant tract of land immediately to the south of the Turner property which is zoned commercial, but all of the Technical School's other property in the area is zoned O-I.

Although we have made numerous efforts to straighten out this matter, both with the Zoning Office and also with the Zoning Review Board, we have been unable to do so.

A C-1 zoning classification is clearly consistent with the CDP and, furthermore, does not adversely impact on the Technical School. Numerous commercial establish-

ments are located on both sides of Stewart Avenue across from the Turner property and for several miles to the south of this property. A C-1 zoning classification is consistent with the zoning of all those tracts of land. Logic and reason tell us that the CDP should not permit every commercial establishment located on both sides of Stewart Avenue directly to the south of the Turner property to remain zoned C-1 while Mr. Turner's land is the only commercial property rezoned from C-1 to O-I.

Regardless of whether the rezoning of this property was inadvertent or deliberate, it has severely damaged the owner by restricting expansion or improvement of the existing motel and reducing substantially the value of the property for resale.

The rezoning of the Turner property constituted an arbitrary and capricious act which damaged Mr. Turner without just compensation and without due process. Whether inadvertent or not, the property should be rezoned to its original classification.

Respectfully submitted,

Powell, Goldstein, Frazer & Murphy
By: /s/ Frank Love, Jr.
Frank Love, Jr.

FL:j
cc: Morris Finley
Mary Davis
Buddy Fowlkes
Richard Guthman
Archie Byron
Ira Jackson
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EXHIBIT "C"

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May 29, 1984

The City Council of Atlanta
City Hall
68 Mitchell Street, S.W.
Atlanta, Georgia 30335
Re: Mr. O. L. Turner's Application
for Rezoning - No. Z-84-22

Dear Ladies and Gentlemen:

While I believe that my letter to you regarding the above zoning matter, dated May 24, 1984, made it perfectly clear that we are challenging the constitutionality of the ordinance which rezoned Mr. Turner's property from C-1 to O-I, we have subsequently read a decision of the Supreme Court decided in April which establishes certain guidelines for raising the constitutionality of the Zoning Ordinance, and we therefore ask that this letter be con-

sidered as an additional implementation of our statement previously made.

It is the contention of Mr. Turner that the ordinance which rezoned his property from C-1 to O-I was unconstitutional in that it rendered his property unmarketable and seriously affected the value of his property without just and adequate compensation being provided for him, and that the zoning was without due process of law in violation of the Fourteenth Amendment to the U. S. Constitution, Article I, Section 1, Paragraph 1 and Article I, Section 3, Paragraph 1(a) of the Constitution of Georgia.

Respectfully submitted,

Powell, Goldstein, Frazer & Murphy
By: /s/ Frank Love, Jr.
Frank Love, Jr.
Attorneys for O. L. Turner

FL:j
cc: Marvin S. Arrington
Debby McCarty
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John Lewis

APPENDIX E

CHAPTER 36

Changes and Amendments

Section 16-36001 Requirements for change.
Section 16-36002 Application for or initiation of a change.
Section 16-36003 Report by bureau of planning.
Section 16-36004 Public hearing.
Section 16-36005 Deposits, plat of survey to accompany application for change.
Section 16-36006 Conditional development.

Section 16-36001 Requirements for change.

(a) Whenever the public necessity, public convenience, general welfare or good zoning practice justify such action, and after consideration by the bureau of planning, the council may, by ordinance, change the regulations set forth in this part and may change the zoning districts as established on the district maps. (Code 1965, App. A Sec. 38.10)

(b) Comprehensive development plan - zoning changes. One ordinance adopting the district changes pursuant to section 3-603 (d) of the Charter of the City of Atlanta shall be introduced each calendar year at any time following the last regular council meeting in February of each year. All of the procedures prescribed by law for the adoption of a comprehensive zoning text and maps shall be followed and the requirements for public hearing, public notice and advertisement applicable thereto shall apply to such annual amendment. None of the procedures set forth in Chapter 36 of the Zoning Ordinance of the City of Atlanta which are not required for the initial adoption of a comprehensive zoning plan and maps shall apply to such annual ordinance. (Ord. of 9/10/75, Sec. 1)

APPENDIX F

CHAPTER 36

Changes and Amendments

Section 16-36001 Requirements for change.
Section 16-36002 Application for or initiation of a change.
Section 16-36003 Report by bureau of planning.
Section 16-36004 Public hearing.
Section 16-36005 Deposits, plat of survey to accompany application for change.
Section 16-36006 Conditional development.

Section 16-36004 Public hearing.

(a) Before adopting any amendment or change to the district maps or text of the ordinance, the zoning review board shall hold a public hearing thereon, official notice of which, describing the property proposed to be rezoned, shall be given once a week for two (2) weeks in the newspaper in which the sheriff's advertisements are carried in the county in which the real estate is located.

(b) In addition to the above official notice, the planning director shall:

(1) At least two (2) weeks prior to such hearing, cause to be posted in a conspicuous place on the property for which a zoning change is under consideration, a sign not less than six (6) square feet in area, which shall show thereon information as to any proposed change in the classification and date of the hearing.

a. One such sign shall be placed on each street upon which the property abuts, as described in the ordi-

nance proposing the zoning change under consideration, provided, however, that not less than one such sign shall be placed on the property described in the part proposing the zoning change for each 600 feet of street frontage or fraction thereof, and if 600 feet of street frontage or fraction thereof shall be intersected by another street or streets, one such sign shall be placed between each intersection.

b. In the event that the property under consideration has no street frontage and is not a part or parts of property having street frontage no sign or signs will be required. However, if the property under consideration is a part or parts of properties having street frontage, signs shall be placed as provided in (a) above.

(2) Cause notice of the hearing, describing the property proposed to be rezoned, to be given by regular mail to the owner or owners of the property within 300 feet of the property. The notice shall be mailed to property owners as ownership and address appear on the tax records of the county in which the property is located. (Code 1965, App. A, Sec. 38.40)

APPENDIX G

CHAPTER 10

O-1 Office-Institutional
District Regulations

Section 16-10.001 Scope of provisions.
Section 16-10.002 Statement of intent.
Section 16-10.003 Permitted principal uses and structures.
Section 16-10.004 Permitted accessory uses and structures.
Section 16-10.005 Special permits.
Section 16-10.006 Transitional uses, structures, requirements.
Section 16-10.007 Development controls.
Section 16-10.008 Maximum height limitations.
Section 16-10.009 Minimum off-street parking requirements.
Section 16-10.010 Limitations on signs.

Section 16-10.003 Permitted principal uses and structures.

(16) Hotels, containing no more than 30 rooms and not exceeding 40 feet in height. Further, said hotels shall not contain any meeting or convention facilities nor shall they contain any food and beverage service facilities except those designed to serve only the occupants of the hotel and their guests. (Ord. No. 1983-76, Sec. 1, 11/23/83)

APPENDIX H

CHAPTER 11

C-1 Community Business District Regulations

Section 16.11.001 Scope of provisions.
Section 16-11.002 Statement of intent.
Section 16-11.003 Permitted principal uses and structures.
Section 16-11.004 Permitted accessory uses and structures.
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Section 16-11.011 Limitations on signs.

Section 16-11.003 Permitted principal uses and structures.

(14) Hotels and motels, rooming houses, boarding-houses.

APPENDIX I

CHAPTER 12

C-2 Commercial Service District Regulations

Section 16-12.001 Scope of provisions.
Section 16-12.002 Statement of intent.
Section 16-12.003 Permitted principal uses and structures.
Section 16-12.004 Permitted accessory uses and structures.
Section 16-12.005 Special use permits.
Section 16-12.006 Transitional uses, structures, requirements.
Section 16-12.007 Development controls.
Section 16-12.008 Maximum height limitations.
Section 16-12.009 Minimum off-street parking requirements.
Section 16-12.010 Limitations on signs.

Section 16-12.003 Permitted principal uses and structures.

(14) Hotels and motels, rooming houses, boarding-houses.

APPENDIX J

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

FIFTH AMENDMENT

Indictment, punishment, etc.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

Citizenship (Section 1.)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Supreme Court, U.S.
FILED
FEB 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-695

In The
Supreme Court of the United States
October Term, 1987

DOROTHY LOUISE TURNER, Executrix
of the Estate of O. L. Turner,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

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DOROTHY LOUISE TURNER, Executrix
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CITY OF ATLANTA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Due to the large number of unsupported comments and errors in Petitioner's Statement of the Case (Petition, 3), Respondent offers the following factual summary.

Petitioner is the widow of former property owner Mr. O. L. Turner, who died during the pendency of this appeal. O. L. Turner was alive and traveling out of state at the time this case was tried. (T.3). He chose not to testi-

fy, although the trial court, with the consent of the City, authorized submission of subsequent deposition testimony if Plaintiff desired. (T.101,102). No subsequent deposition testimony was taken. His son, Mr. D. L. Turner, testified. Accordingly, the references in the Petition to "Turner" are to the owner's son, not to the actual owner of the property in issue. D. L. Turner has no property interest in this land; his only connection is "manager." (T.40).

Petitioner's property was improved with a 19 room motel when Mr. O. L. Turner purchased it in 1962. O. L. Turner expanded the motel to 29 rooms in 1975. (T.40). Adequate space existed for further expansion at that time. (T.50). During this period, the property was zoned C-1 and C-2, commercial designations. (T.82). The property continues to be used as a motel. (T.45). On 1 April 1985, during the pendency of this lawsuit at the trial level, O. L. Turner voluntarily entered into a 20-year lease for the hotel's operation by the current lessee. (T.45). The lease expires in the year 2005. (T.53). No expansion plans for the hotel exist. (T.51).

In the mid-1970's, the City of Atlanta began planning for the adoption of a new comprehensive zoning ordinance affecting the entire City and replacing the existing comprehensive zoning ordinance, known as the "1954 ordinance." (T.76). Virtually every parcel of property in the City was affected in some way by the new ordinance (T.70), some one-hundred twenty thousand (120,000) parcels. (T.95). Approximately 20,000 to 30,000 parcels were substantially changed from one zoning category to another. (T.70). Some of these changes were to "less restrictive"

zoning classifications, such as residential to commercial; others, such as the tract in issue, were to "more restrictive" zoning classifications, such as commercial to residential. This latter group constituted about 5%—or roughly 1000 to 1500—of the re-designated parcels.

Individual mailed notice to every property owner in the City of Atlanta affected by this new ordinance was not attempted by the City. It was determined that such individual notice, assuming it were possible, would be an enormous, hugely burdensome task which was not required by local ordinance or state law, nor best suited to a comprehensive change of this sort. Instead, the City embarked on a massive, multi-faceted information dissemination campaign employing every aspect of the public media.

As one part of this process, a long series of public hearings were held to inform the public of the ordinance. (T.77). Formal public hearings were held in 1979 and 1980 by the Zoning Review Board (ZRB), the public hearing zoning board for the City of Atlanta. The ZRB held a series of seven public hearings which were advertised, *inter alia,* in both the Fulton and DeKalb County newspapers. (Atlanta lies within these two counties). Proposed texts, maps, plans, and planning personnel were all available to assist the public and explain the changes and process. (T.77,85).

In addition to the formal ZRB hearings, numerous hearings were also held throughout the City of Atlanta's Neighborhood Planning Unit (NPU) system. Atlanta is carved into 24 NPU's. The NPU system is one of the City's institutionalized means of informing the public and receiving input on land use issues. Each NPU is organized

by a committee system and holds public meetings at least monthly. Every resident or property owner in the City is eligible by ordinance to be a member of their respective NPU. The City notified each NPU of the proposed changes, and individual mailings advertising NPU hearings on the proposed comprehensive ordinance were mailed by every NPU to every member of that NPU. Each NPU held public hearings at which all proposed maps, texts, and plans were made available for public review and explained by the City's professional planners. (T.79-83).

Further, announcements notifying the public of the new zoning ordinance were made through the news media, including television, radio, and newspaper advertisements and public announcements. (T.77,85). The City's goal was to put the entire Atlanta area on notice that a new comprehensive zoning ordinance affecting all parcels of land was to be enacted. There was no evidence at trial that O. L. Turner did not receive, through one or more of these notice procedures, actual notice of the City's proposed comprehensive zoning ordinance. (T.49).

On 15 December 1980, the Atlanta City Council adopted this new zoning ordinance. (T.77). It contained a one-year enactment delay, becoming effective 1 January 1982, and is known as the 1982 Zoning Ordinance. This is the zoning ordinance which now governs the zoning of all property in the City of Atlanta.

The 1982 Zoning Ordinance "downzoned" the parcel at issue herein from C-1 and C-2 (Commercial) to O-I (Office-Institutional). Under that ordinance, as amended, Petitioner's motel is fully conforming and permissible as zoned. In March, 1984, O. L. Turner applied to the City

of Atlanta to rezone his property from O-I to C-1 (Commercial). The record of the proceedings before the City shows that he sought this rezoning so that any condemnation action of his property would require payment of commercial, rather than O-I, prices.[1] O. L. Turner's son testified that there was no intent to change the use of the property at all (T.51,55) or use it for commercial purposes. The City Council denied O. L. Turner's application for rezoning on 1 June 1984. The trial court upheld that decision, which was in turn affirmed by the Georgia Supreme Court in *Turner v. City of Atlanta*, 257 Ga. 306, 357 S.E.2d 802 (1987). This petition followed.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE "TAKING" ISSUE

A. This Court Lacks Jurisdiction

Petitioner claims jurisdiction under 28 U.S.C. § 1257 (3), arguing that the enactment of the City of Atlanta's 1982 Comprehensive Zoning Ordinance is repugnant to the "taking" clause of the Fifth Amendment of the Constitution of the United States as applied to states through the Fourteenth Amendment. Petitioner identifies Appendix D, pp. A20-A22 of her Petition—the Complaint—as that portion of the record in which the federal taking claim

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[1] O. L. Turner's son testified that he believed that a nearby school was planning to condemn the hotel. No such condemnation ever occurred, and no other evidence of this belief was produced.

was raised in the state court system (Petition 6). That Complaint nowhere references the Fifth Amendment to the United States Constitution. The remainder of the record is also silent as to this specific federal constitutional claim, as is the published opinion of the Georgia Supreme Court. *Turner v. City of Atlanta, supra.* It is well-settled that this Court's jurisdiction to reexamine a state court's final judgment by writ of certiorari can arise only if the record as a whole shows that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496 (1981). Since the federal taking issue was not properly raised or presented in the Georgia courts, this Court lacks jurisdiction.

This Petition is more deficient than the Petition in *Webb* because the Georgia Constitution contains a taking clause: "Except as otherwise provided in this paragraph, private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Ga. CONST. art. 1, § 3, ¶ 1. To the extent that Petitioner's Complaint and the record reference an alleged unlawful confiscation of property rights without "prior payment of just compensation," such references are clearly to the state constitutional clause, since the "prior payment" language is unique to the Georgia Constitution.

The Georgia Supreme Court opinion reinforces this position. That Court has traditionally used the word "taking" as a term of art to describe that which occurs when a zoning regulation causes "significant detriment" to the owner which is "insubstantially related to public health, safety, and welfare." *See, e.g., Jones v. City of At-*

lanta, 363 S.E.2d 254 (1988). This is an analysis under the Georgia Constitution and bears little or nothing in common with that kind of analysis used to determine whether a land use regulation "goes so far" as to violate the Fifth Amendment. Factors used to analyze a federal taking claim, such as economic impact of the regulation, interference with reasonable investment-backed expectations, and the character of the governmental action, *see, MacDonald, Sommer & Frates v. Yolo County,* 106 S.Ct. 2561, 2566 (1986), are conspicuously absent from this record because they were never considered. This case was at all times viewed by the Georgia courts—and all litigants—as a zoning case under the Georgia Constitution. The failure of the Georgia court system to consider any federal constitutional taking issues means as a policy and jurisdictional matter that this Court should not undertake a review of that question.

B. It is Settled Law That No Taking Occurs Under These Facts

Assuming there is a sufficient record upon which to properly analyze a federal constitutional taking claim, this Petition raises no issues relating to a Fifth Amendment "taking" in the zoning context which have not already been conclusively ruled upon by this Honorable Court. The Petition should be denied since none of the Supreme Court Rule 17 considerations are presented.

Recognizing this dilemma, Petitioner seeks to distinguish this case from the "usual zoning case" by calling this a "down-zoning", the "reverse" of the usual zoning case. (Petition, 9). This distinction is superficial and constitutionally meaningless.

A municipality indisputably has the power to zone. *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926). The power to zone is by definition the power to classify, to draw lines and assign use restrictions. Zoning, by its nature, "interferes significantly with owners' uses of property." *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 674 n.8 (1976). That interference, in turn, nearly always affects value. Hence, mere diminution in value is never enough to invoke constitutional inquiry; it requires, at a minimum, arbitrary and unreasonable governmental behavior. It is settled law that only unjustified zoning actions are potentially compensable. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978).

If a city can zone, it can upzone, downzone, and utilize other zoning tools, because the power to do all of this derives from the power to zone itself. The density or type of classification—in either direction—is not alone constitutionally significant. Changes in boundaries—up, down, or otherwise—are facially permissible; they are all local land-use decisions sharing identical policy questions and sources of power. It is the lack of a relation between any zoning action and the public welfare which creates the potential to run afoul of the Fifth Amendment. Petitioner incorrectly asserts the mere enactment of a downzoning ordinance constitutes a taking under federal law.

This Court's earliest zoning decision established this point. *Euclid v. Ambler Realty Co., supra*, like the case at bar, involved adoption of a comprehensive zoning ordinance. The ordinance greatly restricted previously unrestricted properties; it effectively downzoned those properties from previous expectations of unlimited development

rights. The decision, of course, holds that absent clearly arbitrary or unreasonable provisions which have no substantial relation to public welfare, zoning—more restrictive or less restrictive—is a valid police power exercise.

Agins v. City of Tiburon, 447 U.S. 255 (1980) was also a downzoning case, and parallels the Petition *sub judice*. Tiburon downzoned property, restricting its development to five houses on five acres of land previously zoned for higher density development. This Court held that the downzoning ordinance alone did not constitute a Fifth Amendment taking.[2] *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) was also a downzoning. This Court held that further proceedings were necessary to decide whether a taking had occurred at all. The unresolved facts had to do with the uses to which the property could be put as zoned. *San Diego*, like *Agins*, teaches that the mere act of downzoning does not itself constitute a Fifth Amendment taking; the question is whether the specific ordinance is justified, and what use the property can support as zoned.

Petitioner apparently does not contend, apart from the issue of facial validity of the ordinances, that the Atlanta City Council's actions in adopting the 1982 Zoning Ordinance were unreasonable. If she does, the facts in-

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[2] Petitioner seeks to distinguish *Agins* on the grounds that it involved vacant land, while the property in issue is developed. (Petition, 10). That argument is disingenuous: the only portion of Petitioner's property subjected to future hotel development potential is the remaining vacant space on the lot. Atlanta has not destroyed an ongoing business operation, but has curtailed only the construction of more hotel rooms on the vacant portions of the lot.

disputably show otherwise, even assuming quibbles over facts can ever authorize certiorari review. The City of Atlanta downzoned this property not as an isolated, malicious act, but as part of a new comprehensive zoning ordinance. This particular parcel was downzoned so that it would conform to the surrounding, well-established office-institutional corridor of which it is a part.[3] More importantly, there is no question here about what use can be made of the property, whether that use is profitable, or even whether Petitioner desires that use. Petitioner believes the existing use is so profitable and so reasonable she obligated herself to that use until the year 2005, and did so while this litigation was pending. She has no right to use or possession of this property before that date, and the lessee is not a party to this litigation. There are no plans for a different commercial use. The hotel use exists, is profitable, and is time-honored.

Given these facts, it is difficult to understand what it is Atlanta has "taken" from this Petitioner. At most, the City has restricted expansion of the hotel beyond thirty (30) rooms to the remaining portion of the lot now vacant

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[3] Petitioner incorrectly states that the Georgia Supreme Court refused to consider whether the existing zoning is related to public concerns. (Petition, 10). In addition to the explicit trial court finding (Appendix C to Petition at A13, A14) based on a mountain of evidence (T.75-T.90) affirmed by the Supreme Court, the Supreme Court opinion specifically states that the existing zoning comports with the City's comprehensive development plan, the long range land use plan governing land use planning in Atlanta. The Court correctly cites *Moore v. Maloney*, 253 Ga. 504, 321 S.E.2d 335 (1984) as highlighting the importance of that compliance as well as the connection to valid public welfare issues.

after possession is reobtained in 2005. But this too is an issue resolved. *Keystone Bituminous Coal v. DeBenedictis*, 107 S.Ct. 1232 (1987) dispelled the notion that separate segments of property can be separately analyzed for taking purposes. And Petitioner's pleas notwithstanding, *First English Evangelical Lutheran Church v. Los Angeles County*, 107 S.Ct. 2378 (1987) provides her no support whatsoever. *First English* presumed a full taking had occurred. It dealt solely with the remedy available assuming a taking exists. The Petition at bar of necessity asks—or should ask—whether a taking has occurred. The remedy for a temporary, assumed take is not the question in this case. Petitioner puts the cart before the horse in arguing otherwise.

There has been no "taking" under the Federal Constitution under these facts. The cited cases answer all taking issues even remotely raised in this Petition. There being no important, unresolved federal questions necessitating review, this Petition should be denied.

2. THE "NOTICE" ISSUE

Two preliminary factual points must be made. First, it is inaccurate to state that the City failed to provide Petitioner with "any notice", (Petition, 12) and did not provide "notice by publication." (Petition, 13). Notice of the new zoning ordinance was published extensively. (*Supra*, 3-4). Second, Petitioner failed to prove at trial that owner O. L. Turner did not receive actual notice of the enactment of the 1982 Atlanta Zoning Ordinance. This case will always labor under that evidentiary flaw because O. L. Turner is now deceased. Failure to prove the absence of actual notice is fatal to this Petition. This Court

may not assume O. L. Turner had no notice in order to reach the constitutional question.

Viewed in perspective, this Petition raises no procedural due process issues requiring this Honorable Court's review. Petitioner focuses on the upzoning/downzoning "distinction" (discussed *supra*) and the isolated events of O. L. Turner's property in an attempt to mask the magnitude of the enormous procedural due process task which faced the City of Atlanta in enacting its 1982 Zoning Ordinance. The question, however, is whether the notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . with due regard for the practicalities and peculiarities of the case. . . ." *Mullane v. Central Hanover Bank,* 339 U.S. 306, 314 (1950). Accordingly, the notice issue must be comprehensively viewed. When it is, it can be seen that the notice provided satisfied the Fourteenth Amendment.

Atlanta is not a small city, and virtually every parcel of real estate—some 120,000 pieces—was in some way affected by the 1982 Zoning Ordinance. (T.70). About 20,000 through 30,000 parcels changed zoning classifications. (T.70). Five percent, representing 1,000 to 1,500 parcels, were placed in "more restrictive" classifications: "downzoned." Petitioner observes only this 5% downzoned figure and concludes that individual notice for that figure was manageable. The argument is myopic in the extreme.

First, this "5% approach" assumes that only downzoned property owners are entitled to notice. This assumption is wrong. Upzoning property frequently restricts uses

in equally damaging ways. And if the owner is entitled to notice, so are nearby, affected residents. The numbers of persons due notice mushroom exponentially.

Second, even assuming only 5% are due notice, the sole way to identify that 5% would have been to compare each parcel in the new ordinance to each parcel in the old ordinance. That is a direct comparison of 120,000 parcels of land. (T.95). One can gather an understanding of the enormity of that task by noting that mailing out notices to owners and neighbors when everyone is already identified requires about one-half day of processing per parcel. (T.72).

Petitioner's constitutional claim, taken to its logical conclusion, would have essentially required the City to identify and notify by mail each owner of every parcel of land in Atlanta. This is not even arguably required by the Fourteenth Amendment. It is certainly not required by *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), which involved, in a dissimilar context, notice to mortgagees in tax sales where the name and address of the mortgagees, who stood to lose total interest in the mortgaged property, were easily discernable and small in number.

The Georgia Supreme Court properly placed this case in perspective, as it has done in previous similar cases. *See, e.g., Wilson v. City of Snellville*, 256 Ga. 734, 352 S.E.2d 759 (1987). The decision below is fully consistent with and indeed mandated by both the teaching of *Mullane* and common sense. It is in accord with all leading zoning authorities. *See, e.g.*, 1 RATHKOPF, LAW OF ZONING AND PLANNING 10-32 (4th ed. 1987). Atlanta's multi-

faceted public notice approach (outlined *supra* at 3-5) was reasonably calculated to put all of the metro Atlanta area on notice that every parcel in the City was going to be affected by a new comprehensive zoning ordinance and provide a meaningful opportunity to be heard. Respondent submits this approach was the very best way to adequately inform the hundreds of thousands of affected persons. The Fourteenth Amendment, under existing law, requires no more.

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CONCLUSION

There is no doubt that recent decisions by this Honorable Court have illuminated new issues and questions, and to some degree created uncertainty and speculation, over municipal zoning powers. It is equally without doubt that this Petition raises none of these issues. There are serious jurisdictional and evidentiary holes in Petitioner's case. Even if there were not, the Petition dwells on issues decided in previous decisions. Respondent accordingly respectfully urges this Honorable Court to deny this Petition.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

DOROTHY LOUISE TURNER, EXECUTRIX
OF THE ESTATE OF O. L. TURNER,
Petitioner,

vs.

CITY OF ATLANTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

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U.S. Constitution, Fourteenth Amendment 1

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ARGUMENT

1. The "Takings" Issue

A. This Court Clearly Has Jurisdiction

Respondent argues that this Court lacks jurisdiction to consider the "takings" issue because Petitioner did not reference the Fifth Amendment of the United States Constitution in the proceedings below. Respondent has failed to cite any authority supporting its unfounded contention that Petitioner must specifically raise the Fifth Amendment *in addition to* the Fourteenth Amendment when bringing a "takings" claim against a municipality.

In *Webb v. Webb*, 451 U.S. 493 (1981), which Respondent cites for the general proposition that a federal claim must be adequately presented, this Court also held that

> Although it would avoid uncertainty and expenditure of much time and effort if litigants identified in state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, we have not insisted on such inflexible specificity.

Webb, 451 U.S. at 399.

In paragraph 12 of the Complaint, Petitioner alleged that the zoning classification was "arbitrary, unreasonable and confiscatory . . . unconstitutional and in violation of Article I, Section 1, Paragraph 1 of the Georgia Constitution, Article I, Section 3, Paragraph 1 of the Georgia Constitution, and the due process clause of the Fourteenth Amendment of the Constitution of the United States." (Appendix D, pp. A20-A21). Petitioner properly raised a federal constitutional "takings" claim by challenging the confiscatory nature of the City of Atlanta's actions in violation of the Fourteenth Amendment of the United States Constitution.[1] Furthermore, the "takings" clause of the Fifth Amendment applies only to the federal gov-

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1. In *Street v. State of New York*, 394 U.S. 576 (1969), this Court held that "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this court is not bound by the decision of the state courts." *Id.* at 583. This Court also held that "[t]here are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential. . . . And if the record as a whole shows . . . by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Id.* at 584; *See also Bryant v. Zimmerman*, 278 U.S. 63 (1928).

ernment, whereas the "takings" clause is applicable to the states through the Fourteenth Amendment. *See, Chicago, B.&Q.R.R. v. Chicago,* 166 U.S. 226, 235-41 (1897).

Notwithstanding the fact that the Georgia Constitution has its own "takings" clause, the blistering dissent of Justice Smith below leaves no doubt that the Georgia Supreme Court considered Petitioner's federal constitutional claim. Justice Smith cited *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 107 S.Ct. 2378 (1987), and *Nollan v. California Coastal Commission,* 107 S.Ct. 3141 (1987), for the proposition that "if the government takes property, whether in form of a physical taking or a regulatory taking, by zoning or otherwise, be it temporary or permanent, partial or whole, the government must compensate the citizen for the taking." (Appendix A, p. A3).

2. The Notice Issue

The City of Atlanta does not deny that it did not attempt to provide individual notice[2] to Petitioner that the improved commercial property would be downzoned by the 1982 Atlanta Zoning Ordinance. Furthermore, Respondent does not deny that the alleged notice by publication never identified Petitioner's property. This was constitutionally insufficient. *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983).

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2. Respondent contends, however, that Petitioner failed to prove at the trial that O. L. Turner did not receive actual notice of the enactment of the 1982 Atlanta Zoning Ordinance. This is simply not true. (T. 49).

CONCLUSION

As acknowledged by Respondent, recent decisions by this Court have illuminated new issues, questions, uncertainty and speculation over municipal zoning powers. This case provides an ideal opportunity to further develop the substantive law in this area and to remove existing confusion emanating from the *Nollan* and *First English Church* decisions. Furthermore, the very important notice issue in this case has not been previously addressed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have caused to be served the necessary copies of this reply brief upon

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by causing the printer to place said copies in the United States mail, postage prepaid.

I further certify that all parties required to be served have been served.

This 1st day of March, 1988.

JAMES D. MEADOWS